COURT NO.7

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No.836 of 2001
(Old case No.2395 of 1987)

Gajendra Chand S/o Sri Gopi Chand
R/o Chandak,
Police Station and District: Pithoragarh
.....Appellant

Versus

State of U.P. .....Opposite Party

Sri Lokendra Dobhal and Sri Kuldeep Rawat, learned counsel for the appellant
Sri M.A. Khan, learned brief holder for the State.

Dated: 16.08.2007

Hon'ble Dharam Veer, J.

This criminal appeal has been preferred under section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) against the judgment and order dated 11.09.1987 passed by Sessions Judge, Pithoragarh in Sessions Trial No.21 of 1987, State of U.P. v. Gajendra Chand, whereby the learned Sessions Judge has convicted the present appellant under Section 376 of The Indian Penal Code, 1860 (hereinafter referred to as IPC) and awarded rigorous imprisonment for a period of three years and a fine of Rs. 1,000/-, in default of payment of fine further simple imprisonment of six months. It was also directed that realization of amount of the fine shall be given to prosecutrix Smt. Mohini Devi as compensation.

2. In brief, the prosecution case is that on 03.10.1985 in the night of about 10-11 P.M. daughter of the complainant Manju had gone in her neighbouring

house alongwith her younger brother and her husband had gone to Chharandeo, then present accused-appellant Gajendra Chand had entered the room and had locked the door from inside and forcibly had committed rape with the complainant Smt. Mohini Devi. After hearing cries of the complainant (Smt. Mohini Devi), Smt. Hemanti Devi, Manju and Saroj had come at the place of occurrence. In between the present appellant had run away from the spot. With the same averments, the FIR, i.e. Ex.Ka-1, was lodged by Smt. Mohini Devi in the Police Station Kotwali Pithoragarh on 04.10.1985 at 11.00 A.M. On the basis of the written FIR, a chick report was prepared by Head Moharir Sri Ram Dutt i.e. Ex.Ka-4. The entry in the G.D. was made, the copy of the G.D. is Ex.Ka-5. Smt. Mohini Devi was medically examined by the Medical Officer, District Mahila Hospital, Pithoragarh on 04.10.1985 at 12.15 P.M. The medical report prepared by the Medical Officer is Ex.Ka-2 and the supplementary report prepared by the Medical Officer on 05.10.1985 i.e. Ex.Ka-3. The present appellant was arrested by the police on 04.10.1985 at about 17.30 hours and the entry was made in the G.D. at 18.05 hours on 04.10.1985, the copy of G.D. is Ex.Ka-6. The present appellant was sent for medical examination on the same date of about 20.25 hours. The entry was made in the G.D., the copy of G.D. is Ex.Ka-7. Petticoat of Smt. Mohini Devi was taken in possession by the Investigating Officer on 04.10.1985 and *fard* was prepared i.e.Ex-Ka-8 and underwear of the appellant was also taken in possession and prepared *fard* i.e. Ex.Ka-9. The Investigation Officer has also prepared the site plant of the place of occurrence i.e. Ex.Ka-10. During the course of investigation the Investigating Officer recorded the

statement of the witnesses and after completing the investigation, he submitted the charge-sheet against the appellant on 28.01.1986 under Section 376 IPC in the Court of Chief Judicial Magistrate, Pithoragarh i.e. Ex. Ka-11.

3. The Chief Judicial Magistrate after applying the provisions under Section 207 Cr.P.C. committed the case to the Court of Session under Section 209 Cr.P.C. on 23.06.1987.

4. Learned Sessions Judge framed charges against the present accused-appellant on 03.07.1987 under Section 376 IPC. The charges were explained to the appellant who pleaded not guilty and claimed to be tried. To prove its case the prosecution examined P.W.1 Smt. Mohini Devi (victim), P.W.2 Dr. Mamta Chand, who medically examined Smt. Mohini Devi, P.W.3 Manju, who is the daughter of the prosecutrix and P.W.4 Sri Ram Datt, Head Moharir. The statement of the present appellant had been recorded under Section 313 Cr.P.C., who had denied the allegations made against him and stated that he and his brother had collected grit (Bajari) and Harish, the son of Smt. Mohini Devi sold that grit (Bajari). On being questioned as to why he had sold it, the prosecutrix came in rescue and promised to pay Rs.40/- by tomorrow as exchange of the grit (Bajari). For that the conversation was taken place between the two and due to this enmity he has falsely been implicated.

5. After appreciating the evidence and hearing learned counsel for both the parties, the learned Sessions Judge has convicted the appellant under Section 376 IPC

and awarded rigorous imprisonment for a period of three years and a fine of Rs.1,000/-, in default of payment of fine further simple imprisonment for six months. It was also directed that realization of amount of the fine shall be given to prosecutirx Smt. Mohini Devi as compensation. Against the judgment and order dated 11.09.1987 the appellant has filed the present appeal.

6. I have heard Sri Lokendra Dobhal and Sri Kuldeep Rawat, learned counsel for the appellant as well as Sri M.A. Khan, learned brief holder for the State and perused the entire record of the trial court and the instant appeal.

7. To prove the case the prosecution has examined P.W.1 Smt. Smt. Mohini Devi. She has stated in her statement that incident was taken place about one year and nine months before. Time was of night hours and she was alone in her house. The present accused-appellant had come in her house and he had locked the doors from inside and he had committed bad work with her. She has further stated that he had committed rape with her. She made a noise and on hearing her noise, Manju (daughter of the prosecutrix) Smt. Hemanti Devi, and Saroj had reached the place of occurrence. Seeing the witnesses the present accused-appellant had fled from the scene of occurrence. She has further stated that in the morning of the next day she came to Pithoragarh and she dictated FIR to the petition writer and after hearing the report he had lodged the report in that Police Station i.e. Ex.Ka-1. From there she was sent for medical examination in the District Hospital where she was medically examined and after that she went to

her house. Her petticoat was also taken in the possession by the Investigation Officer on the same day. She identified her petticoat in the court which was taken out from the sealed mohar bundle i.e. Ex.1. She further stated that on the date of occurrence her husband had gone to Chhadandeo and he was not at home. In the cross-examination she has stated that she was firstly married to one Shyamu Ram and from the wedlock of Shyamu Ram she gave birth to three children, viz. Prakash, Harish and Manju. Harish and Manju were living with her and Prakash was living with her husband Shaymu Ram. Again she was married with Bhagat Ram and from the wedlock of Bhagat Ram she delivered one son, namely, Gopal. She was also deserted by Bhagat Ram and she was living in the village Chandak. She has further stated that around her house so many people were living and she had named the persons who were her neighbours, namely, Arjun Singh and Subedar Chand and the present appellant was also her neighbour. She further stated in para –33 that she did not want to proceed the case simply she wanted that the appellant might be threatened. Para-33 of the statement of the prosecutrix is quoted below:-

"हेमनी देवी के साथ मैं चण्डाक से आकर सीधे थाने गई थी। मैने थाने पर कहा था कि केस को आगे मत बढाना थोडा धमकी दे देना। पुलिस वालो ने कहा ऐसा नही होता है।

<u>To Court:</u> मुझसे सिपाही ने यह भी कहा था कि मुकदमा सरकारी हो जायेगा तुम्हें पैसा नही देना पडेगा और जो खर्चा होगा वह सरकार देगी। मैने रिपोर्ट लिखाकर इसलिए दी थी कि मुल्जिम को धमका देंगे।

To Counsel:- *रिपोर्ट थाने पर ही लिखाई थी। मुझे नहीं मालूम रिपोर्ट उन लोगों ने किससे लिखाई थी। फिर कहा कि रिपोर्ट* Ex.Ka1 *अर्जी नवीस के घर में लिखी थी। उसके बाद थाने पर दी थी और तब अस्पताल गई और फिर घर गई। रिपोर्ट लिखाने से पहले मुझे कोई वकील नहीं मिले थे। थाने पर दरोगा जी ने कहा था कि इस तरह की रिपोर्ट लिखाकर आओ। जब मैं अर्जी नवीस के यहाँ गई थी और रिपोर्ट* Ex.Ka1 *लिखाई थी तब पुलिस वाला कोई मौजूद नहीं था। रिपोर्ट लिखने के बाद मुझे पढ़कर न सुनाया था न समझाया था।''*

8. She has Further stated in para 41 in the cross-examination that when the appellant had come in her room, the doors were open and the night was dark and at that time the electricity was not there. For burning the lantern there was no kerosene oil in the house and there was dark in the room. When the appellant had entered the room she was cooking the food by burning the woods. Para-41 is quoted below:-

'मुलजिम जब मेरे कमरे में आया था तब दरवाला खुला था। रात अंधेरी थी। बिजली भी नहीं आ रही थी। घर में चिराग जलाने के लिए मिट्टी तेल भी नहीं था। कमरे के अंदर अंधेरा था। जब मुलजिम कमरे के अंदर घुसा था तब उस समय मैं लकड़ी जलाकर खाना पका रही थी।''

9. P.W.2-Dr. Mamta Chand has stated in her statement that on 04.10.1985 at 12.15 P.M. the prosecutrix Smt. Mohini Devi was medically examined in the District Mahila Hospital, Pithoragarh. On that day Constable Nandan Mehta and Constable Merry Peter had taken Smt. Mohini Devi to the Mahila Hospital, where she had medically examined the prosecutrix and in external examination Dr. Chand found her breast multiparus in size and pendulous, auxillary hairs fully

developed and brownish in colour and pubic hairs developed scarily, blackish-brown in colour. Dr. Chand found no mark of external injury in her private part. In internal examination Dr. Chand found whitish discharge but no bleeding has there. On vaginal examination Dr. Chand found labia major, minora well developed, vagina two finger loose, uterus normal size, Cx. Normal size and no tenderness was found. Thereafter Dr. Mamta Chand sent the vaginal smear to B.D. Pandey Hospital for spermatozoa examination and on the basis of said examination she prepared a medical report i.e. Ex.Ka-2. She received the report from B.D. Pandey Hospital on 05.10.1985 and on the basis of this report she prepared the supplementary report i.e. Ex.Ka-3. She opined that according to the report of B.D. Pandey Hospital no spermatozoa was found in vaginal smear. As opinion Dr. Mamta Chand has stated that according to above finding she is habitual for sexual intercourse and there is no fresh sign of intercourse. The Doctor has further stated in the cross-examination that no alive or dead spermatozoa was found, hence it is possible that there was no sexual intercourse committed with Smt. Mohini Devi before one month from the date of incident.

10. Smt. Manju is P.W.3 in the case in hand has stated in her statement that she had not seen any incident. She has stated that she had only seen the accused-appellant in a running condition. She has stated in para-5 of the cross-examination that when the accused-appellant had come out from the house, at that time there was dark and electricity was not there, so it was difficult to identity and person and she had seen the accused-appellant from the back side when he was

running, Learned Session Judge has not relied on the statement of P.W.3-Manju.

11. P.W.4, Head Moharir Ram Dutt, who had stated that on 04.10.1985 he was posted at Police Station Kotwali Pithoragarh. On the same day at 11.00 A.M. Smt. Mohini Devi lodged FIR i.e Ex. Ka-1 at the Police Station. On the basis of this report he prepared *Chick* report i.e. Ex.Ka-4 and the entry was made in the G.D., the copy of G.D. is Ex.Ka-5. The Investigation of this case was entrusted to Sub Inspector Tika Ram and the prosecutrix Smt. Mohini Devi was sent to the District Mahila Hospital, Pithoragarh alongwith Constable Nandan Mehta and Constable Merry Peter for the medical examination. The entry was made in the G.D. i.e. Ex.Ka-5. On 04.10.1985 at 17.30 hours the accused-appellant was arrested alongwtih the case property and taken to the Police Station and the entry was made in the G.D. at 18.05 hours on 04.10.1985, the copy of G.D. is Ex.Ka-6. The accused-appellant was sent to the District Hospital for medical examination on the same day at about 20.25 hours. The entry was made in the G.D., the copy of G.D. is Ex.Ka-7. During the investigation S.I. Sri Tika Ram was transferred, therefore, the rest of the investigation was entrusted to Sub Inspector Sri Puran Chandra Joshi. During the investigation S.I. Sri Puran Chandra Joshi was also transferred and the remaining investigation was entrusted to Sub Inspector Sri Lalit Prasad Sharma, who has filed charge-sheet after completing the investigation on 28.01.1986. Sub Inspector Sri Lalit Prasad Sharma died in an accident. He has also proved the recovery memo i.e. Ex.Ka-8, Ka-9 and site plan i.e. Ex.Ka-10 and the charge sheet is Ex.Ka-11

12. After that the statement of accused-appellant was recorded under Section 313 Cr.P.C. who denied the allegations made against him and in defence he has stated that he and his brother had collected grit (Bajari) and Harish, the son of Smt. Mohini Devi, sold that grit (Bajari). On being questioned as to why he had sold it, the prosecutirx came in rescue and promised to pay Rs.40/- by tomorrow as exchange of the grit (Bajari). For that the conversation was taken place between the two and due to this enmity he has falsely been implicated. In defence he has not filed any documentary or oral evidence.

13. Learned counsel for the appellant has submitted that on the basis of the above said evidence no case under Section 376 IPC is made out against the appellant. He has submitted that the supplementary medical report i.e. Ex.Ka-3 shows that no spermatozoa was found according to the pathologist in the spermatozoa examination for which the vaginal smear slide was sent to B.D.Pandey Hospital. He has further submitted that the Medical Officer has given a report that there is no sign of intercourse, hence no rape or intercourse has been committed by the appellant with the prosecutrix Smt. Mohini Devi. He has relied on page no.504 of Modi's Medical Jurisprudence & Toxicology of which para (iii) **Genitals** of the chapter "**Examination of the Victim"** is quoted below:-

> "The vaginal secretion from the posterior fornix should always be obtained by introducing a plain sterile cottonwool swab (or 1 ml pipette) and the material

> obtained on the swab must immediately be transferred to a microscopic slide and spread out in the form of a thin film and fixed. After staining, the slide should then be examined microscopically for the presence of human spermatozoa, which is a positive sign of rape, particularly in the case of children and grown-up virgins. **In grown-up married women, it does not necessarily indicate rape, but it proves the occurrence of a recent sexual intercourse. Even presence of motile spermatozoa is not necessarily indicative of intercourse few hours before the time of examination. The presence of spermatozoa in the vagina after intercourse has been reported by Pollak (1943) from 30 minutes to 17 days, and by Morrison (1972) upto 9 days in vagina 12 days in the cervix.** However, in the vagina of a dead woman, they persist for a longer period. Estimation of the levels of acid phosphates in a fresh specimen may be helpful in opining for presence of seminal fluid."

14. On the basis of the above said citation, learned counsel for the appellant has submitted that no spermatozoa was found in the vaginal smear and there was no fresh sign of the intercourse and the Medical Officer has also stated in para 11 of her statement in the cross-examination that before one month of the said occurrence no intercourse was taken by the prosecutrix. Under these circumstances and on the basis of the above said evidence, learned counsel for the appellant has submitted that on 03.10.1985 at 10-11 P.M. no intercourse was committed with the prosecutrix Smt. Mohini Devi. On the basis of above said evidence and the circumstances, argument of the learned counsel for the appellant has got weight.

15. Learned counsel for the appellant has further cited a judgment rendered by Hon'ble Supreme Court in the case of **Yerumalla Latchaiah** v. **State of A.P.** reported in (2006) 3 SCC (Cri) 373. Para-3 of the judgment is quoted below:-

> "In the present case, age of the victim was only eight years at the time of alleged occurrence. Immediately after the occurrence, she was examined by Dr. K. Sucheritha (PW 7) who has stated in her evidence that no injury was found on any part of the body of the victim, much less on private part. Hymen was found intact and the doctor has specifically stated that there was no sign of rape at all. In the medical report, it has been stated that vaginal smears collected and examined under the microscope but no sperm detected. The evidence of the porsecutrix is belied by the medical evidence. In our view, in the facts and circumstances of the present case, the High Court was not justified in upholding the conviction."

16. On the basis of the above said judgment (Supra), learned counsel for the appellant has submitted that the oral evidence of the prosecutirx Smt. Mohini Devi is not supported by the medical evidence, hence it is not proved that on 03.10.1985 the prosecutrix was sexually intercoursed or raped by the present appellant. Learned counsel for the appellant has further submitted that only evidence against the appellant is solitary evidence of Smt. Mohini Devi and she has also stated in the cross-examination that on the date of the occurrence there was dark night and when the appellant entered the room there was no electricity. She lodged the FIR in the Police Station only due to the reason that the appellant might be taught a lesson or he might be threatened. She did not want to get the appellant punished.

17. Learned counsel for the appellant has further cited a judgment of Hon'ble Supreme Court rendered in the case of **Sadashiv Ramrao Hadbe** v. **State of Maharashtra and Another** reported in (2007) 1 SCC (Cri) 161. Learned counsel for the appellant has relied on para-9 of the aforesaid judgment which is quoted below:-

> "It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

18. In the present case, only the statement of prosecutrix Smt. Mohini Devi is against the appellant and that statement also does not inspire confidence of the Court as her statement is not supported by the medical evidence. From the medical report, it is well established that no rape was committed with the prosecutrix on 03.10.1985 but she has stated in her statement that rape was committed with her at the said time and place. Even otherwise her house is surrounded with a number of people but no public witness has come forward to give statement that such incidence was happened inside the residential area at such time and place.

19. In view of the discussions made above and the judgments cited above, the prosecution has failed to establish a case under Section 376 IPC against the appellant beyond reasonable doubt, hence the conviction recorded by the court below under Section 376 IPC against the appellant is liable to be set aside.

20. The appeal is allowed. Conviction and sentence made against the appellant in Sessions Trail No.21 of 1987 under Section 376 IPC for a period of three years' R.I. and fine of Rs. 1,000/- is quashed.

(Dharam Veer, J.)

16.08.2007
RBS